No. 95-157

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER LEE ARMSTRONG, ET. AL.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

A. WHETHER THE COLORABLE BASIS STANDARD FOR INITIATION OF DISCOVERY ON A CLAIM OF DISCRIMINATORY PROSECUTION, AS EXPLAINED AND REFINED BY THE NINTH CIRCUIT COURT OF APPEALS, IS SUFFICIENTLY IN ACCORD WITH ESTABLISHED FEDERAL LAW.

B. WHETHER A DISTRICT COURT ABUSED ITS DISCRETION IN ISSUING A NARROW DISCOVERY ORDER AFTER BEING PRESENTED WITH EVIDENCE PROVIDING A COLORABLE BASIS TO BELIEVE SELECTIVE PROSECUTION MAY HAVE OCCURRED.

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BRIEF FOR RESPONDENT AARON HAMPTON

OPINIONS BELOW

The opinion of the en banc court of appeals is reported at 48 F.3d 1508. The panel opinion of the court of appeals is reported at 21 F. 3d 1431.

JURISDICTION

The judgement of the en banc court of appeals was entered on March 2, 1995. By order dated June 21, 1995, Justice

O' Connor extended the time within which to file a petition for a writ of certiorari to and including July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

PARTIES TO THE PROCEEDING

The petitioner is the United States of America. The respondents are Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin.

STATEMENT

In April of 1992, respondent Aaron Hampton, Christopher Armstrong, Freddie Mack, Shelton Martin, and Robert Rozelle were charged with federal offenses for their alleged involvement in the distribution of cocaine base ("crack"). The charges stemmed from an investigation conducted under the direction of a joint state and federal task force comprised of detectives from the Inglewood Narcotics Division and agents from the Bureau of Alcohol, Tobacco, and Firearms.

Respondents, each of whom is a young African-American male, were charged with conspiracy to distribute cocaine base under 21 U.S.C. § 846. Some of the defendants were also charged with selling cocaine base under 21 U.S.C. 841 (a)(1) and using firearms in connection with drug trafficking in violation of 18 U.S.C. § 924 (c). The decision to charge the defendants with federal rather than California State offenses was significant. Federal law imposes a minimum sentence of 10 years and a maximum of life for those convicted of selling more than 50 grams of

cocaine base. 21 U.S.C. § 841 (b). By contrast, under California law, the minimum sentence for that offense is three years and the maximum is five. Cal. Health & Safety Code § 11351.5 (Deering 1993).

Respondents filed a Motion for Discovery and/or Dismissal of Indictment for Selective Prosecution, claiming that the decision to prosecute on federal instead of state charges was based on race. To support the motion for discovery, the defendants offered into evidence a study of every case involving a charge under 21 U.S.C. §§ 841 and 846 that the Federal Public Defender's Office for the Central District of California had closed in 1991. The study showed that in all 24 such cases the defendants had been black.

The district court granted the motion for discovery. Specifically, the district judge ordered the government to: (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearms offenses; (2) identify the race of the defendants in those cases;(3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the U.S. Attorney's Office for deciding whether to bring cocaine base cases to the federal court.

The government chose not to comply with the discovery order and instead filed a motion for reconsideration. In support of its motion, the government provided a list of all defendants charged with violations of 21 U.S.C. §§ 841 and 846 over a three year period (without any racial breakdown) as well as

declarations by three law enforcement officers and two Assistant United States Attorneys. The declarations collectively asserted that socioeconomic factors led certain ethnic and racial groups to be particularly involved with the distribution of certain drugs and that Blacks were particularly involved in the Los Angeles-area crack trade. The declarations also contained a description of some of the race neutral factors on which federal prosecutors based their charging decisions for crack-related offenses. The factors included were the strength of the evidence, the deterrent value of bringing the charge, the federal interest in the prosecution, and the suspect's criminal history.

In response, the defendants bolstered the statistical study they had submitted at the initial hearing with additional declarations. First, one of the defendant's counsel offered an affidavit stating that she had spoken with a halfway house intake coordinator who told her that in his experience treating cocaine base addicts, whites and blacks dealt and used the drug in equal numbers. Second, another defense attorney asserted in a declaration that his experience and conversations with judges, lawyers, and defendants led him to conclude that many non-blacks were prosecuted for cocaine base offenses in state court. Finally, the defendants submitted an article from the Los Angeles Times discussing the disparate federal sentences imposed for cocaine base and regular cocaine offenses.

The District Court denied the motion for reconsideration. The court stated its reasons for the denial at the hearing: "The statistical data provided by the Defendant

raises a question about the motivation of the Government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal Court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal court could be motivated by race. Without expert testimony, this Court cannot conclude that the defendants' evidence is explained by social phenomena."

The government again chose not to comply with the discovery order. The district court judge dismissed the indictments, but stayed the order pending appeal. The government timely appealed.

2. A divided panel of the court of appeals reversed. The majority constructed a three category test based on Redondo-Lemos, supra, and Bourgeois, supra. The dissent argued that the district court had not abused its discretion by ordering discovery on the claim of selective prosecution, and that the majority opinion created three highly artificial categories of cases.

3. The court of appeals granted rehearing en banc to resolve a conflict in its cases over the standards governing discovery when a defendant claims selective prosecution. By a 7-4 vote, the court held that the district court had not abused its discretion in ordering discovery in this case. The majority first held that a district court had discretion to order discovery on a claim of selective prosecution when the evidence provides a colorable basis for believing that discriminatory

prosecutorial selections have occurred. The existence of a colorable basis must be judged in light of all the evidence presented to the district court and not simply that offered by the defendant. "The United States Attorney must be given the chance to make whatever showing [he] deems appropriate to dispel the district judge's concerns." (app. at 8a)[1] However, where the government fails to make a showing sufficient to dispel those concerns, then a colorable basis remains even though the government has provided some evidence in response.

Explaining and refining the standard articulated in United States v. Bourgeois 964 F 2d 935, 940 (9th Cir.) cert. denied, 113 S. Ct. 290 (1992) the court of appeals held that:

a. The showing needed for discovery is less than that needed for a prima facie case. (app. at 9a)

b. Inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim. (Id at 11a)

c. Defendants attempting to show a colorable basis that warrants discovery can only be expected to make good faith efforts to obtain whatever evidence is available, as well as to provide whatever evidence is in their possession. (Id at 12a)

The court noted that the colorable basis standard enunciated in its opinion is more in line with other circuits

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[1] app. shall refer to the appendix to the petition for a writ of certiorari filed in this case.

and that it accommodates the twin but conflicting concerns that discovery in selective prosecution claims implicates: "The colorable basis standard ensures that the government will not be called to answer for its charging decisions as a result of frivolous and unwarranted allegations. At the same time, the standard ensures that defendants will not face unjustified hurdles at the discovery stage that will preclude them from demonstrating the existence of actual discrimination in the selection of defendants for criminal prosecution." (app. at 14a, 15a)

Chief Judge Wallace, concurring with the majority, agreed that the abuse of discretion standard permits the district court flexibility and voted to affirm. (Id at 30a) While noting that usually evidence of "others similarly situated" is needed to establish a prima face case, he nevertheless found that at the discovery stage, where there is evidence of a large enough number of prosecutions directed at a single race over a sufficiently long period of time, eventually there becomes a point where that evidence is sufficient to establish a colorable basis of selective prosecution. (Id at 31a)

The dissent found that the majority opinion "crafts a new standard" rather than clarifying the colorable basis standard and that it allowed discovery on a showing that discrimination "may" have occurred, rather than a definitive showing it had occurred. (app. dissent at 44a.) The dissent would require a specific showing of a similarly situated non-black offender who

was not prosecuted, rather than a colorable basis for the belief such an individual exists. (Id. at 46a.)

The dissent agreed that, in limited circumstances, a pattern of prosecution of a single racial group could provide circumstantial evidence of intent. (Id. at 58a) It disagreed that the statistical evidence presented to the district court here was sufficient to support the inference.

REASONS FOR DENYING THE PETITION

The Ninth Circuit Court of Appeals explained and refined its rulings in two previous discovery cases United States v. Bourgeois 964 F 2d 935 (9th Cir. 1992) United States v. Redondo-Lemos 995 F 2d 1296, 1302 (9th Cir. 1992) and in so doing made a ruling that is squarely in the mainstream of federal discovery law on the issue of when discovery can be ordered on a claim of selective prosecution in a criminal case.

By holding that defendants must present sufficient evidence to provide a colorable basis for believing that the government has engaged in discriminatory prosecution before a court may order discovery, the appellate court "ensures that the government will not be called to answer for its charging decisions as a result of frivolous and unwarranted allegations. At the same time the standard ensures that defendants will not face unjustified hurdles at the discovery stage that will preclude them from demonstrating the existence of actual

discrimination in the selection of defendants for criminal prosecution. " (app. at 14a, 15a)

1. The court of appeals relied not only on the statistical data presented by the Federal Public Defenders Office that showed that the federal government prosecuted only African-Americans for crack cocaine offenses, but also upon declarations demonstrating that white defendants were routinely prosecuted in state court for crack cocaine. The court found those declarations were probative evidence that like-situated defendants of a different race were not prosecuted in federal court (app. at 23a ft. 8)[2] The sum of the evidence presented to the district court places the holding of the court of appeals in the mainstream of its fellow circuits; that "inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim".

The court of appeals had already stated in Redondo-Lemos supra 955 2d at 1301-02 that statistical disparities alone may suffice to provide the evidence of discriminatory intent that will establish a prima facie case of selective prosecution. In Bourgeois,supra, the court held that to obtain discovery on a selective prosecution claim, a defendant must present specific

[2]. The government petition ignores the finding of the court of appeals that the affidavits were probative evidence, while arguing at the same time that the affidavits had insufficient evidentiary value to be considered. (petition at 17, Footnote 1)

facts which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of the government. The court noted that it was a high threshold. (Id. at 939) The Bourgeois court found that the defendant had failed to establish a colorable basis for the first element of the claim that "others similarly situated have not been prosecuted" citing United States v. Wayte 470 U.S. 598,(1985)[3] The instant opinion of the court of appeals acknowledges that the standard of evidence sufficient to trigger discovery must necessarily amount to less than the evidence needed to establish a prima facie case, and that defendants attempting to show a colorable basis that warrants discovery can only be expected to make good faith efforts to obtain whatever evidence is available, as well as to provide what evidence is in their possession. (app. at 12a) By holding that "inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim," the court of appeals settles the tension between Redondo-Lemos and Bourgeois while at the same time upholding the colorable basis standard.

[3] United States v. Wayte 470 U.S. 598 held that to succeed on a selective prosecution claim, the defendant bears the burden of showing "that others similarly situated have not been prosecuted and that the prosecution is based on an impermissible motive" and that selective prosecution claims are evaluated "according to equal protection standards". supra at 608-09 However Wayte did not address the issue of discovery on a claim of selective prosecution (Id at 605 ft. 5) (emphasis added)

In so doing, the court notes that the evidence of discriminatory prosecution presented to the district court in the discovery motion was much stronger than the ninth circuit held insufficient to initiate discovery in Bourgeois. (app at 16a) The opinion hardly supports petitioner's subsequent allegation that the court of appeals holding amounts to a "reformulation of legal principles".

The colorable basis standard is embraced by the third, sixth, seventh, tenth and D.C. circuits,[4] while two circuits have a less-strict "non frivolous" standard[5] and four apply a stricter prima facie showing test. [6] The colorable basis test as clarified in the court's opinion takes the middle ground that "accommodates the twin but conflicting concerns" that discovery in selective prosecution claims implicate.

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[4] See In re Grand Jury, 619 f. 2d 1022, 1030 (3d Cir. 1980); United States v. Adams, 870 F. 2d 1140, 1146 (6th Cir. 1989); United States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir. 1990); United States v. Armstrong, 48 F. 3d 1508, 1512 (9th Cir. 1995); United States v. P.H.E., Inc., 965 F. 2d 848, 860 (10th Cir. 1992); Attorney General of United States v. Irish People, Inc., 684 f. 2d 928, 948 (D.C. Cir. 1982).

[5] See United States v. Greenwood, 796 F. 2d 49, 52 (4th Cir. 1986); United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1988).

[6] See United States v. Penagarican-Soler, 911 F.2d 833, 838 (1st Cir. 1990); St. Germain of Alaska Easter Orthodox Catholic Church v. United States, 840 F. 2d 1087, 1095 (2d Cir. 1988): United States v. Johnson, 577 F. 2d 1304, 1308 (5th Cir. 1978); United States v. Parham, 16 F. 3d 844, 847 (8th Cir. (1994).

2. Petitioner's claim that the Ninth Circuit holding has a "substantial adverse impact on the prompt and effective enforcement of the criminal law" and "places the entire crack enforcement program for that District under a cloud" does not withstand scrutiny. The same district court judge that granted the discovery motion in the instant case denied a similar motion when the government properly responded with information regarding its policies. See United States v. Henry No. CR 94628-CBM (C.D. Cal June 26, 1995). Had the government complied with the concerns of the district court as expressed in its narrow discovery order, it could have avoided this controversy. As noted by petitioner, the affidavits prepared in United States v. Henry, supra, have satisfied discovery in other cases (petition at 23 ft. 3) Respondent is aware of no case where discovery has been ordered following that response by the government. In essence the government has put the issue to rest by complying with the district court's cautious and fact-appropriate original order.

In predicting the ramifications of the holding in this case to discovery as applied to other statutes, petitioner joins the dissent in ignoring the limited question and complaint presented to the district court judge: That African-American males are more frequently prosecuted for federal crack offenses, with the increased liability for punishment, than for state crack

offenses, where the punishment is remarkably less severe.[7] That issue does not translate to crimes such as violation of immigration laws, where the only prosecutions occur under federal law. Similarly, the perceived danger of future challenges to white race and male gender prosecutions in LSD, pornography and prostitution cases does not take into account the specific phenomenon presented in this case to the district court judge and the court of appeals.

The unique problems involving the disparity of treatment of defendants for the use and sale of crack cocaine and powder cocaine in federal court, as well as the disparity of sentences for crack cocaine between federal and state courts, have attracted national attention and led to consideration by congress and the United States Sentencing Commission for reform in these areas.[8] The evidence presented to the district court that federal authorities had targeted a racial minority made the narrow discovery order of the district court judge appropriate. District court judges routinely fashion discovery orders on a case-by-case basis, based on their observations, experience and the evidence presented to them. For that reason district court discovery orders are not disturbed absent a clear abuse of

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[7]. Respondent Aaron Hampton is facing mandatory life imprisonment without possibility of parole in the instant federal case. Had the case been filed "across the street" in the Los Angeles County Court under the state statute, Mr. Hampton would be facing a maximum of approximately six years in actual custody.

[8] See U.S. Sentencing Commission: Materials Concerning Sentencing for Crack Cocaine Offenses, 57 Criminal Law Reporter 2127, 2131 (May 31, 1995)

discretion. United States v. Balough 820 F. 2d 1485,1491 (9th Cir. 1987).[9]

The court of appeals emphasized that its discovery holding does not reach the ultimate issue of whether defendants have in fact demonstrated the existence of selective prosecution. (app. at 8a) It found that the evidence necessary to obtain a discovery order must obviously be substantially less than that needed to prove the charge itself. Nevertheless the appellate court insists upon evidence that provides a colorable basis for believing that discriminatory prosecutorial decisions have occurred. The existence of a colorable basis must be judged in light of all the evidence presented to the district court and not simply that offered by the defendant. "The United States Attorney must be given the chance to make whatever showing he deems appropriate to dispel the district court's concerns." (app. at 8a)

3. Finally, the court of appeals colorable basis standard of review for discovery fits squarely within the parameters of cases decided by this Court, particularly where equal protection and racial classifications are involved.

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[9]. Other circuits also review for abuse of discretion See e.g. United States v. Heidecke, 900 F 2d 1155,1162 (7th Cir.1990); United States v. Hintzman, 806 F. 2d 840, 846 (8th Cir. 1986); United States v. Greenwood, 796 F. 2d 49,52 (4th Cir. 1986); United States v. Berrios, 501 F. 2d 1207, 1212 (2nd Cir. 1974); United States v. Berrigan, 482 F. 2d 171, 181 (3rd Cir. 1973)

Although the defendant bears the burden of proving purposeful discrimination, [s]he may rely upon circumstantial evidence of invidious intent based upon proof of a disproportionate impact in the application of the law. Batson v. Kentucky 476 U.S. 79, (1986) Arlington Height v. Metropolitan Housing Development Corp. 429 U.S. 252, 266 (1977) Washington v. Davis 426 U.S. 229, 242 (1976). This court held in Arlington Heights v. Metropolitan Housing Development Corp. supra, 429 US. 252, 266 that a direct showing of discriminatory intent is not always necessary to make out an equal protection claim; under ordinary equal protection standards, a claimant may prove discriminatory purpose circumstantially. (Id at 266) "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face". (Id at 266) See also Yick Wo v. Hopkins 118 U.S. 356, 30 (1886) Gomillion v. Lightfoot 364 U.S. 339 (1960) Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of impact as may be available. Washington v. Davis, supra 426 U.S. 229, 242 (1976)

Petitioner unwisely attempts to join the standard applicable to a motion to dismiss for selective prosecution with the standard applicable to a motion for discovery. The district court and the court of appeal ruled only on the latter.

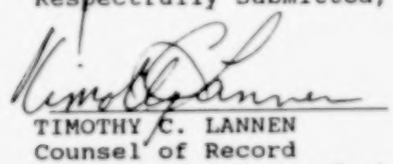
By initiating limited discovery based upon the evidence presented, the district court acted properly within its

discretion. The court of appeals correctly affirmed that ruling using the colorable basis standard for discovery in a criminal case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, TIMOTHY C. LANNEN, a member of the Bar of this Court, hereby certify that on August 24, 1995, Respondent's OPPOSITION TO PETITION FOR CERTIORARI was served upon counsel listed below by depositing copies of same in the United States mail, with first class postage prepaid, addressed as follows:

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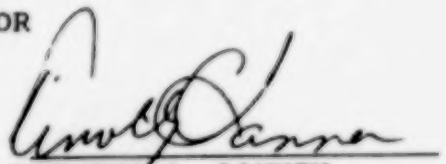

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